

1 ELDA M. SIDHU
2 General Counsel
3 Nevada Bar No. 7799
4 JANET L. MERRILL
5 Assistant General Counsel
6 Nevada Bar No. 10736
7 UNIVERSITY OF NEVADA, LAS VEGAS
8 4505 S. Maryland Parkway, Box 451085
9 Las Vegas, Nevada 89154-1085
Telephone: (702) 895-5185
Facsimile: (702) 895-5299
elda.sidhu@unlv.edu
janet.merrill@unlv.edu
Attorneys for Defendants

10 **UNITED STATES DISTRICT COURT**
11 **DISTRICT OF NEVADA**

12 RYAN ENLOW,
13 Plaintiff,

14 vs.

15 STATE OF NEVADA *ex rel.* BOARD OF
16 REGENTS OF THE NEVADA SYSTEM
17 OF HIGHER EDUCATION ON BEHALF
18 OF UNIVERSITY OF NEVADA, LAS
19 VEGAS, DOE INDIVIDUALS I-X, ROE
20 CORPORATIONS I-X.

21 Defendant.

CASE NO.: 2:19-cv-01517-KJD-BNW

**DEFENDANT'S MOTION TO DISMISS
PLAINTIFF'S COMPLAINT**

21 Defendant, the State of Nevada *ex rel.* Board of Regents of the Nevada System of Higher
22 Education, on behalf of the University of Nevada, Las Vegas ("Defendant" or "UNLV") by and
23 through counsel, Janet L. Merrill, Esq., Assistant General Counsel, University of Nevada, Las
24 Vegas, Office of General Counsel, hereby files its Motion to Dismiss Plaintiff's Complaint
25 ("Complaint").

26 ///

27 ///

28 ///

1 This Motion is made based upon FED. R. CIV. P. 12(b)(6), the following Memorandum of
2 Points and Authorities, the pleadings and papers on file herein, and any oral argument to be made at
3 the hearing on this matter.

4 DATED: September 25, 2019.

5 /s/ Janet L. Merrill
6 ELDA M. SIDHU
7 General Counsel
8 Nevada Bar No. 7799
9 JANET L. MERRILL
10 Assistant General Counsel
11 Nevada Bar No. 10736
12 UNIVERSITY OF NEVADA, LAS VEGAS
4505 S. Maryland Parkway, Box 451085
Las Vegas, Nevada 89154-1085
Telephone: (702) 895-5185
Facsimile: (702) 895-5299
Attorneys for Defendant

MEMORANDUM OF POINTS AND AUTHORITIES

1.

FACTUAL ALLEGATIONS

18 On or about August 30, 2019, Plaintiff filed a Complaint in this Court asserting three
19 different causes of action:

20 1. First Cause of Action, Discrimination Based on Disability in Violation of State and
21 Federal Statutes;
22 2. Retaliation under Federal Law, 42 USC §2000e-3 and State Law, NRS 613.340;
23 3. Violation of the Americans with Disabilities Act.

24 See ECF No. 1, Complaint. In other words, Plaintiff's entire case is based on an alleged disability.
25 However, Plaintiff fails to provide pertinent and obligatory factual allegations about his alleged
26 disability.

27 | //

28 | //

1 In an introductory allegation, Plaintiff claims his action is based on “race, color, age,
2 disability and/or national origin and for illegal retaliation...,” seemingly including any and all forms
3 of discrimination. *See* Complaint, at ¶1 (emphasis added). Plaintiff alleges (without specificity)
4 “Mr. Enlow suffers from social anxiety, a physical and/or mental impairment which significantly
5 limits one or more of his major life activities.” *Id.*, at ¶14 (emphasis added). Another allegation is
6 entirely conclusory: “Mr. Enlow is disabled for purposes of the American with Disabilities Act.”
7 *Id.*, at ¶15. Plaintiff alleges “UNLV continued to stigmatize and humiliate Mr. Enlow for having a
8 disability....” *Id.*, at ¶49.

9 Plaintiff further alleges:

10 On or about June 3, 2019, Mr. Enlow filed a charge of discrimination with
11 the EEOC alleging discrimination on the basis of disability and retaliation.” *Id.*, at
¶ 56.

12 Upon information and belief, UNLV discriminated against Mr. Enlow
13 because of his disability. *Id.*, at ¶ 58.

15 Plaintiff is a member of the class of persons protected by state and federal
16 statutes prohibiting discrimination based on disability. *Id.*, at ¶ 61.

17 Because Plaintiffs disability limits at least one of Plaintiff's major life activities, Plaintiff is an individual with a disability under the ADA. *Id.*, at ¶ 86.

18 | See ECF No. 1, at various ¶ (as cited above).

19 Plaintiff's allegations are void of the requisite factual information necessary to sustain federal
20 or Nevada litigation based on an alleged disability. The "disability" allegations are non-descript and
21 compound (*i.e.* and/or), citing to a set of possibilities without specification. Most notably, there are
22 no factual allegations about which major life activity is limited by Plaintiff's unspecified disability.

II.

LEGAL ARGUMENT

25 A. Standard of Review for Motion to Dismiss Under FED. R. CIV. P 12(b)(6)

26 In considering a motion to dismiss for failure to state a claim upon which relief can be granted,
27 all material allegations in the complaint are accepted as true and are to be construed in the light most
28 favorable to the non-moving party. *N. Star Int. v. Ariz. Corp. Comm'n.*, 720 F.2d 578, 580 (9th Cir.

1 1983) (*citation omitted*); *Cerros v. N. Las Vegas Police Dept.*, 2008 WL 608641, 1 (D. Nev. 2008).
 2 “However, a court does not necessarily assume the truth of legal conclusions merely because they
 3 are cast in the form of factual allegations in the plaintiff’s complaint.” *Cerros*, 2008 WL 608641 at
 4 1, *citing Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994).

5 A plaintiff’s obligation to provide grounds of his entitlement to relief requires more than
 6 labels, conclusions, and a formulaic recitation of the elements of the cause of action. *Bell Atlantic*
 7 *Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1965 (2007). ““Factual allegations must be enough
 8 to raise a right to relief above a speculative level on the assumption that all allegations in the
 9 complaint are true (even if doubtful in fact).”” *Bell Atlantic Corp.*, 127 U.S. at 1965. Dismissal can
 10 be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a
 11 cognizable theory. *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 533 (9th Cir. 1984). To
 12 survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to
 13 state a claim to relief that is plausible on its face. *Ashcroft v. Iqbal*, -- U.S. ___, 129 S.Ct. 1937, 1949
 14 (2009). Conclusory allegations and unwarranted inferences are insufficient to defeat a motion to
 15 dismiss.” *In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399, 1403 (9th Cir. 1996).

16 A reviewing court should “begin by identifying pleadings [allegations] that, because they are
 17 no more than mere conclusions, are not entitled to the assumption of truth.” *Ashcroft*, 129 S.Ct. at
 18 1950. “While legal conclusions can provide the framework of a complaint, they must be supported
 19 with factual allegations.” *Id.* “When they are well-pleaded factual allegations, a court should
 20 assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.”
 21 *Id.* “Determining whether a complaint states a plausible claim for relief [is] a context-specific task
 22 that requires the reviewing court to draw on its judicial experience and common sense.” *Id.* “Factual
 23 allegations must be enough to raise a right to relief above the speculative level” and “sufficient to
 24 state a claim for relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544,
 25 555 (2007); *see also Burd v. Bank of N.Y. Mellon*, Case No. 2:13-cv-00705-KJD-NJK; 2013 U.S.
 26 Dist. LEXIS 83322, *3, 2013 WL 2896977 (D. Nev. June 12, 2013).

27 For the reasons set forth below, UNLV respectfully asks this Court to dismiss Plaintiff’s
 28 Complaint because the allegations are conclusory and without sufficient/specific factual basis.

1 **B. Plaintiff Fails to Sufficiently Allege a Disability**

2 “In order to state a claim under Title II of the ADA, a plaintiff must allege: (1) he ‘is an
 3 individual with a disability;’ (2) he ‘is otherwise qualified to participate in or receive the benefit of
 4 some public entity’s services, programs, or activities;’ (3) he ‘was either excluded from participation
 5 in or denied the benefits of the public entity’s services, programs, or activities, or was otherwise
 6 discriminated against by the public entity;’ and (4) ‘such exclusion, denial of benefits, or
 7 discrimination was by reason of [his] disability.’” *O’Guinn v. Lovelock Corr. Ctr.*, 502 F.3d 1056,
 8 1060 (9th Cir. 2007) (citing to *McGary v. City of Portland*, 386 F.3d 1259, 1265 (9th Cir. 2004)
 9 (quoting *Thompson v. Davis*, 295 F.3d 890, 895 (9th Cir. 2002) (per curiam))

10 Courts universally recognize that, in asserting a claim for disability discrimination, the
 11 plaintiff must be plead his or her disability with specificity. *See Bresaz v. Cnty. of Santa Clara*, 136
 12 F. Supp. 3d 1125, 1135 (N. D. Cal. Sept. 20, 2015) (“Although the Court finds that the Decedent
 13 was substantially limited in performing a major life activity, the Court also finds that the SAC fails
 14 to sufficiently allege that the Decedent suffered from a qualifying physical or mental impairment as
 15 defined by the ADA.”); *Alejandro v. ST Micro Elecs., Inc.*, 129 F. Supp. 3d 898, 2015 U.S. Dist.
 16 LEXIS 120840, 2015 WL 5262102, at *3 (N.D. Cal. Sept. 9, 2015) (“Courts have held that a plaintiff
 17 must allege his disability with specificity to state a claim under the ADA.”); *Friedman v. Las Vegas*
 18 *Metro. Police Dep’t*, 2014 U.S. Dist. LEXIS 152523, *7, 2014 WL 5472604 (D. Nev. Oct. 24, 2014)
 19 (“The Charge of Discrimination goes only slightly further, stating twice that the denial of retirement
 20 credentials occurred ‘due to [Plaintiff’s] disability’ without identifying the nature, character, or
 21 degree of Plaintiff’s impairment. (See Charge of Disc. at 2). Alleging that Plaintiff is disabled in
 22 such a conclusory fashion fails to satisfy the requisite standard of plausibility. Therefore, the Court
 23 finds that Plaintiff has failed to sufficiently state a claim for ADA discrimination.”) (internal
 24 citations omitted); *Scott v. Clark County Soc. Servs.*, 2009 U.S. Dist. LEXIS 62601, *11, 2009 WL
 25 1940097 (D. Nev. July 7, 2009) (“In sum, while Michael Scott has shown that he is disabled, his
 26 complaint does not sufficiently aver the other elements required for an ADA claim. He does not
 27 allege that he was denied benefits, and he does not provide any basis for his legal conclusion that
 28 Dannan-Joyner discriminated against him based on his disability. Therefore, Michael Scott has not

1 stated a claim under the ADA that would entitle him to legal relief, and the court will dismiss his
 2 ADA claim pursuant to Federal Rule of Civil Procedure 12(b)(6).”).

3 Plaintiff fails to provide the required “sufficiency” with factual allegations in support of his
 4 alleged disability. No specifics are provided in the Complaint regarding the nature, character, or
 5 degree of Plaintiff’s alleged disability or impairment of any major life activity which existed in or
 6 around June 2019 when Plaintiff “Enlow was notified that his contract would not be renewed, which
 7 is tantamount to a termination.” *See* ECF. No. 1, Complaint, at ¶57. Rather Plaintiff’s Complaint
 8 simply re-iterates he is disabled or has a disability in a conclusory or compound fashion. *See*
 9 *generally id.* Any specificity provided in his Complaint relates to allegations in 2018, not 2019. *See*
 10 *id.*; *see Lee v. Natomas Unified Sch. Dist.*, 93 F. Supp. 3d 1160, 1169 (E. Cal. 2015) (“Courts have
 11 generally held that causation can be inferred from timing alone where the adverse action follows
 12 closely on the heels of the protected activity.”) (citing to *Clark County Sch. Dist. v. Breeden*, 532
 13 U.S. 268, 273-74, 121 S. Ct. 1508, 149 L. Ed. 2d 509 (2001) (stating that the temporal proximity
 14 must be “very close”); *Alex G. v. Board of Trustees*, 387 F. Supp. 2d 1119, 1128 (E.D. Cal. 2005)).

15 Not only does Plaintiff fail to specify the nature, character, or degree of his disability in
 16 relation to the timing of UNLV’s alleged adverse action, but Plaintiff also fails to factually allege
 17 how or which major life activity was substantially impaired. Rather Plaintiff merely alleges “which
 18 significantly limits one or more of his major life activities” and “at least one of Plaintiffs major life
 19 activities.” *See* ECF. No. 1, Complaint, at ¶¶ 14 and 86 (underline added). Notably, a plaintiff’s
 20 failure (such as here) to allege how his/her disability substantially limits a particular major life
 21 activity warrants dismissal. *See e.g. Fee v. Mgmt. & Training Corp.*, 613 Fed. Appx. 654, 654, 2015
 22 U.S. App. LEXIS 14712, *1-2, 2015 WL 5008651 (9th Cir. Aug. 21, 2015) (holding that the district
 23 court properly dismissed Fee’s action because the facts that Fee alleged are conclusory and do not
 24 show that her eczema substantially limits her in a major life activity and finding “[t]he second
 25 amended complaint did not include allegations of fact that Fee’s condition prevents her skin from
 26 functioning.”)(citing to 42 U.S.C. § 12102(1) (defining “disability”); 29 C.F.R. § 1630.2(i)(1)(ii)
 27 (defining “major life activities,” to include the “operation of a major bodily function”); *Weaving v.*
 28 *City of Hillsboro*, 763 F.3d 1106, 1111 (9th Cir. 2014) (a disability is a physical or mental

1 impairment that substantially limits one or more major life activities of the individual who claims
2 the disability)).

3 **III.**

4 **CONCLUSION**

5 Based on the foregoing, UNLV respectfully requests this Court dismiss Plaintiff's Complaint
6 for failure to allege a disability with the required specificity.

7 DATED: September 25, 2019.

8 /s/ Janet L. Merrill

9 ELDA M. SIDHU
10 General Counsel
11 Nevada Bar No. 7799
12 JANET L. MERRILL
13 Assistant General Counsel
14 Nevada Bar No. 10736
15 UNIVERSITY OF NEVADA, LAS VEGAS
16 4505 S. Maryland Parkway, Box 451085
17 Las Vegas, Nevada 89154-1085
18 Telephone: (702) 895-5185
19 Facsimile: (702) 895-5299
20 *Attorneys for Defendant*

CERTIFICATE OF SERVICE

I certify that on this date, September 25, 2019, I served a true and correct copy of the foregoing **DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT** via the Court's CM/ECF Filing System, to the following:

Jenny Foley, Esq.
HKM EMPLOYMENT ATTORNEYS LLP
1785 East Sahara, Suite 325
Las Vegas, Nevada 89104
jfoley@hkm.com
Attorneys for Plaintiff

/s/ Sheena M. Imes
An employee of the Office of General Counsel
University of Nevada, Las Vegas